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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES RAILROAD RETIREMENT BOARD,
Appellant,

v.

GERHARD H. FRITZ,
Appellee.

On Appeal from the United States District Court for the Southern District of Indiana

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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MOTION OF THE NATIONAL RAILWAY LABOR CONFERENCE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 42 of this Court, the National Railway Labor Conference hereby moves the Court for leave to file the attached *amicus* brief in support of the Jurisdictional Statement, as the consent of counsel for the Appellee to the filing of such a brief has not been received.

The National Railway Labor Conference is an unincorporated association which includes most of the nation's Class I railroads among its members. Among other things, it represents those railroads in a wide variety of

labor relation problems of concern to the railroad industry generally, including those relating to legislation or proposed legislation concerning the retirement benefits of railroad employees, their spouses and survivors. A committee established within the Conference, the National Carriers' Conference Committee, normally represents member railroads in national negotiations with unions representing their employees. The members of the National Carriers' Conference Committee were the management members of a Joint Labor-Management Railroad Retirement Negotiating Committee established by the Congress which, at the direction of the Congress, drafted the bill which with some changes was enacted by the Congress as the Railroad Retirement Act of 1974.

For those and other reasons, the decision below holding an important aspect of that legislation to be unconstitutional is a matter of major importance to the Conference and its member railroads. If not reversed, that decision will upset the solution adopted by the Congress in 1974 to the problem of windfall dual benefits, which threatened the solvency of the railroad retirement system. According to the Jurisdictional Statement (n.8, p. 15), the Railroad Retirement Board has estimated that the additional benefits required to be paid by the decision below will result in a cost to the system of some $119 million a year for each of the next 20 years, or some $2.38 billion in all. Among other things, the decision below exhibits a misunderstanding of the 1974 Act, its background and legislative history, including the role of both management and labor members of the Joint Negotiating Committee. We believe that this brief will assist the Court by correcting those misunderstandings and in otherwise supplementing the factual statements and legal arguments contained in the Jurisdictional Statement.

For these reasons, we request the Court to enter an order granting this motion so as to permit the filing of the attached *amicus* brief.

Respectfully submitted,

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INDEX

	Page
Interest of Amicus Curiae	1
Statement of the Case	2
A. The Establishment and Development of the Railroad Retirement System	2
B. The Windfall Dual Benefit Problem and the Report of the Commission on Railroad Retirement	10
C. The Enactment of the Railroad Retirement Act of 1974 and Its Solution of the Windfall Dual Benefit Problem	16
D. The Decision Below	24
Argument	32
Conclusion	39

CITATIONS

Cases: Page

Alton R. Co. v. *Railroad Retirement Board*, 16 F. Supp. 955 (D. D.C. 1936) 3
Califano v. *Boles*, —— U.S. ——, 47 U.S.L.W. 4874 (1979) 33, 34, 36
California v. *Jobst*, 434 U.S. 47 (1977) 33
Chemical Workers v. *Pittsburgh Glass*, 404 U.S. 157 (1971) 29
Dandridge v. *Williams*, 397 U.S. 471 (1970) 36
Delaware Tribal Business Comm. v. *Weeks*, 430 U.S. 73 (1977) 39
Flemming v. *Nestor*, 363 U.S. 603 (1960) 32, 36
Fletcher v. *Peck*, 10 U.S. (6 Cranch) 87 (1810) 38
Ford Motor Co. v. *Huffman*, 345 U.S. 330 (1953) 30
Helvering v. *Davis*, 301 U.S. 619 (1937) 3
Hisquierdo v. *Hisquierdo*, 439 U.S. 572 (1979) 2, 3, 32, 35
Holt Civic Club v. *Tuscaloosa*, 439 U.S. 60 (1978) 36
Humphrey v. *Moore*, 375 U.S. 335 (1964) 30
Matthews v. *Diaz*, 426 U.S. 67 (1976) 34, 35, 37, 38
New Orleans v. *Dukes*, 427 U.S. 297 (1976) 34
Railroad Retirement Board v. *Alton*, 295 U.S. 330 (1935) 3, 7, 35
Richardson v. *Belcher*, 404 U.S. 78 (1971) 32, 34
Schilb v. *Kuebel*, 404 U.S. 357 (1971) 36
State of California v. *Anglim*, 129 F.2d 455 (9th Cir. 1942) 3
Steward Machine Co. v. *Davis*, 301 U.S. 548 (1937) 3
Vaca v. *Sipes*, 386 U.S. 171 (1967) 29
Vance v. *Bradley*, 440 U.S. 93 (1979) 33, 36
Weinberger v. *Salfi*, 422 U.S. 749 (1975) 32, 34, 35

Statutes:

Railroad Retirement Act of 1934, 48 Stat. 1283 ..... 3, 7
Railroad Retirement Act of 1935, 49 Stat. 967 ..... 3, 8
Railroad Retirement Act of 1937, 50 Stat. 307, 45 U.S.C. §§ 228a-228z-1 (1970 ed.) ..... *passim*
§ 1(b) 8
§ 1(d) 8

CITATIONS—Continued

	Page
§ 1(j)	8
§ 1(o)	9, 10
§ 2(a)	5, 6, 9
§ 3(b)	8
§ 3(e)	5
§ 3(j)(1)	6, 10
§ 5	9, 10
§ 5(k)(1)	5
§ 5(k)(2)	11
1946 Amendments, 60 Stat. 722	8, 9
1951 Amendments, 65 Stat. 683	5, 10
1966 Amendments, 80 Stat. 1073	10
1973 Amendments, 87 Stat. 161	6, 18
Railroad Retirement Act of 1974, 88 Stat. 1305, 45 U.S.C. §§ 231-231t (1976 ed.)	*passim*
§ 1(b)	8
§ 1(e)	8
§ 1(o)	10
§ 2(a)(1)	5, 6, 10
§ 2(b)(1)	6, 10, 18
§ 2(c)(1)	18
§ 2(d)(1)	10
§ 3(f)(3)	5
§ 3(h)	22, 27
§ 3(h)(1)	22
§ 3(h)(2)	22
§ 3(h)(3)	22
§ 3(h)(4)	22
§ 3(h)(5)	22
§ 3(i)(3)	8
§ 4(e)	22
§ 4(h)	22
§ 5(d)	22
§ 7(c)(2) & (3)	11
§ 15(d)	23
§ 15(e)	23

CITATIONS—Continued

Page

§ 18(2) 5
§ 204(a)(3) & (4) 21
§ 206(3) 22
§ 207(3) 22
§ 209(a) 22

Railroad Retirement Tax Act, 26 U.S.C. §§ 3201 *et seq.* 4
Social Security Act, 42 U.S.C. §§ 301 *et seq.* ..... *passim*
U.S. Constitution

Fifth Amendment 24, 32, 33
Fourteenth Amendment 32, 33

80 Stat. 1078 4
84 Stat. 791 14
85 Stat. 101 14
86 Stat. 765 14
87 Stat. 162 14
26 U.S.C. § 3101 4
26 U.S.C. § 3111 4

Miscellaneous:

Background Information Relating to Proposed Changes in the Railroad Retirement System, House Committee Print No. 24, 93d Cong., 2d Sess. (1974) 17
Hearings on H.R. 1362 before the House Committee on Interstate and Foreign Commerce, 79th Cong., 1st Sess. (1946) 9
Hearings on H.R. 15301 before the House Committee on Interstate and Foreign Commerce, 93d Cong., 2d Sess. (1974) 17, 21, 28, 29
Hearings on S. 3612 before the Subcommittee on Railroad Retirement of the Senate Committee on Labor and Public Welfare, 93d Cong., 2d Sess. (1974) 17, 21, 28, 30

CITATIONS—Continued

Page

Proposed Changes in the Railroad Retirement System, 1974, Background Material, Draft Legislation, and Recommendations Pursuant to Public Law 93-69, Unnumbered Senate Committee Print, 93d Cong., 2d Sess. (1974) 17
Report of the Commission on Railroad Retirement, *The Railroad Retirement System: Its Coming Crisis*, H. Doc. 92-350 (1972) 4, 5, 11-15
H. Rept. No. 976, 82d Cong., 1st Sess. (1951) 5
H. Rept. No. 93-1345, 93d Cong., 2d Sess. (1974) .. 13, 17-21, 23, 24
S. Rept. No. 890, 82d Cong., 1st Sess. (1951) 5
S. Rept. No. 1710, 79th Cong., 2d Sess. (1946) 9
S. Rept. No. 93-1163, 93d Cong., 2d Sess. (1974) .. 13, 17-21, 23, 24
120 Cong. Rec. 18391 ..... 17, 18, 21
120 Cong. Rec. 35616, 35898 17
44 Fed. Reg. 49538 4

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BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

This *amicus* brief is being filed with the leave of the Court pursuant to its Rule 42.

INTEREST OF AMICUS CURIAE

As is more fully set forth in the motion for leave to file, the National Railway Labor Conference and its member railroads are vitally concerned with the decision below holding an important aspect of the Railroad Retirement Act of 1974 to be unconstitutional. That statute provides retirement benefits to railroad employees, upon retirement, which largely are financed through employment taxes paid by the nation's railroads, almost all of which are members of the Conference. The members of

a committee of the Conference were the management members of a Joint Labor-Management Railroad Retirement Negotiating Committee which, at the direction of the Congress, drafted the bill that was enacted with some changes as the 1974 Act.

Hence, the Conference is thoroughly familiar with the background and purposes of that legislation, including the "windfall" dual benefit provisions held to be unconstitutional by the District Court. We believe that a fuller exposition of that background than is contained in the Jurisdictional Statement will expose even more clearly the error of the decision below. In particular, we shall demonstrate that the distinctions made by the Congress in phasing out "windfall" dual benefits, rather than being irrational as concluded by the lower court, were based upon factors—long-term railroad service and a "current connection" with the railroad industry—that the Congress historically has considered to justify more favorable treatment under the railroad retirement system which primarily is intended to provide benefits for career railroad employees.

STATEMENT OF THE CASE

A. The Establishment and Development of the Railroad Retirement System.

(1) The railroad retirement system is the only Federal retirement program applicable to a single private industry. As this Court recently observed, it "provides a system of retirement and disability benefits for persons who pursue careers in the railroad industry" and was established to "encourage older workers to retire" so as to " 'assure more rapid advancement in the service' and also more jobs for younger workers." *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 573-574 (1979). When the initial effort to accomplish that purpose was aborted

by a decision of this Court [1] holding the Railroad Retirement Act of 1934 (48 Stat. 1283) to be unconstitutional "on the ground that it took property in violation of the Fifth Amendment and exceeded Congress' power under the Interstate Commerce Clause," the "Congress then promptly enacted substantially similar legislation in 1935 based on its power to tax and spend to promote the general welfare. 49 Stat. 967, and 974." *Id.*, at 572 n. 3. And, when "the operation of that legislation was enjoined" by a lower court,[2] "Presidential intervention and extensive negotiations" between the railroads and the unions representing their employees produced a bill "that became the Railroad Retirement Act of 1937. 50 Stat. 307." *Ibid.*

The Railroad Retirement Act of 1937 (hereinafter the "1937 Act"), as amended from time to time, thus provided the statutory basis for railroad retirement benefits until the enactment of the Railroad Retirement Act of 1974 (hereinafter the "1974 Act"), effective January 1, 1975.[3] Those benefits generally have been financed by employment taxes imposed upon both the railroads and their employees, based upon employee compensation from

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[1] *Railroad Retirement Board* v. *Alton*, 295 U.S. 330 (1935).

[2] *Alton R. Co.* v. *Railroad Retirement Board*, 16 F. Supp. 955 (D. D.C. 1936). But see, *e.g.*, *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937); *Helvering* v. *Davis*, 301 U.S. 619 (1937); *State of California* v. *Anglim*, 129 F.2d 455 (9th Cir. 1942), cert. den., 317 U.S. 669 (1942).

[3] The 1937 Act, as amended prior to the 1974 Act, is set forth in the 1970 edition of the U.S.C. and supplements thereto as 45 U.S.C. §§ 228a-228z-1, while the 1974 Act as amended is set forth in the 1976 edition of the U.S.C. and supplements thereto as 45 U.S.C. §§ 231-231t. For convenience and in view of the difference in section numbers, references to specific provisions of the 1937 Act hereinafter are cited to the appropriate section of the 1970 edition of 45 U.S.C. while references to specific provisions of the 1974 Act are cited to the appropriate section of the 1976 edition of 45 U.S.C. Both are included in 45 U.S.C.A.

railroad service up to a monthly maximum.[4] Both the benefits and the taxes consistently have been substantially higher than comparable social security benefits and taxes. See Report of the Commission on Railroad Retirement, *The Railroad Retirement System: Its Coming Crisis*, H. Doc. 92-350 (1972) (hereinafter "CRR Report"), at 7-8, 14, 17-18.

(2) As the Commission on Railroad Retirement observed, "[a]t the outset the railroad retirement system was almost solely a career employee retirement program and this emphasis remains the primary thrust of the system to this day." CRR Report, at 6-7. Among other things, the "retirement benefit formula was structured primarily to reward length of career service in the railroad industry," while the "social security system has developed along lines which emphasize social adequacy rather than career service." CRR Report, at 7. To a certain extent, that emphasis upon rewarding career railroad service in the railroad retirement benefit formula was diluted by amendments of the 1937 Act which imported features of the social security system (CRR Re-

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[4] Such taxes are now imposed by the Railroad Retirement Tax Act (Chapter 22 of the Internal Revenue Code), 26 U.S.C. §§ 3201-3233. At present, both the railroads and their employees pay a tax rate that automatically is the same as the social security tax rate (now 6.13%) for employers and employees. See 26 U.S.C. §§ 3101, 3111, 3201, 3221(b). Since a 1973 amendment (87 Stat. 162), the railroads alone have paid an additional tax in the amount of 9.5% of taxable compensation. 26 U.S.C. § 3221(a). Prior to that amendment, the tax in excess of social security taxes was divided equally between the railroads and their employees, except that since a 1966 amendment (80 Stat. 1078) the railroads alone have paid a supplemental tax to finance the cost of certain supplemental benefits. See p. 6, *infra*. The rate of that supplemental tax, which is applicable to man-hours of compensated work, is fixed for each calendar quarter by the Railroad Retirement Board at a level intended to "make available sufficient funds . . . to pay supplemental annuities. . . ." 26 U.S.C. § 3221(c). For the last quarter of 1979, that rate is 12.5 cents for each such man hour. 44 Fed. Reg. 49538.

port, at 6-7), and particularly by a 1951 amendment guaranteeing that railroad retirement benefits would at least be equal to those that would be paid by social security.[5] "This changed the railroad retirement system into a family income maintenance program by establishing the entire social security benefit structure as a floor within the railroad retirement system while retaining all its earlier staff pension elements." CRR Report, at 7-8.

At the same time in 1951, however, the Congress adopted an amendment intended to confine "the Railroad Retirement System . . . to its original purpose" of meeting "the retirement needs of railroad career employees" who "make railroading their life's work." [6] That amendment introduced a requirement that an employee have at least 10 years of railroad service to be entitled to any railroad retirement benefits upon retirement.[7] If less than 10 years, railroad service is transferred to the social security system and included with the individual's other employment in computing social security benefits.[8]

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[5] Section 3(e) of the 1937 Act, as amended by § 8 of the 1951 amendments (65 Stat. 685) among others, 45 U.S.C. § 228c(e). A similar guarantee is contained in § 3(f)(3) of the 1974 Act, 45 U.S.C. § 231b(f)(3).

[6] H. Rept. No. 976, 82d Cong., 1st Sess. (1951), at 47-48. See also, S. Rept. No. 890, 82d Cong., 1st Sess. (1951), at 14-16, 27, 56, 68.

[7] Section 2(a) of the 1937 Act, 45 U.S.C. § 228b(a), was amended by § 2 of the 1951 amendments (65 Stat. 683) to make at least 10 years of rail service one of the eligibility requirements for an employee retirement benefit. That requirement was carried forward into § 2(a)(1) of the 1974 Act, 45 U.S.C. § 231a(a)(1). Certain conforming changes were made in other provisions of the 1937 Act and are now contained in the 1974 Act.

[8] Section 5(k)(1) of the 1937 Act, as amended by § 22(a) of the 1951 amendments (65 Stat. 687), 45 U.S.C. § 228e(k)(1), and included in the 1974 Act as § 18(2), 45 U.S.C. § 231q(2).

Length of railroad employment also historically has been the basis of several other distinctions favorable to long-service employees. When first enacted, eligibility for an annuity under § 2(a) of the 1937 Act (50 Stat. 309) generally was dependent upon attaining age 65, but individuals with 30 or more years of railroad service could retire on a reduced annuity after attaining age 60 and were eligible for a disability annuity at any age while disabled from work in their regular occupation with the railroads. The reduction for age in the amount of the annuity payable to individuals retiring after age 60 with 30 or more years of service was eliminated for women by a 1946 amendment (60 Stat. 727) and for men by a 1973 amendment (87 Stat. 162). The 1946 amendment also authorized the payment of such a disability annuity to otherwise eligible individuals who had either attained age 60 or had 20 or more years of service (60 Stat. 727). Those exceptions to the age-65 requirement, as contained in the amended 1937 Act (45 U.S.C. § 228b (a)), are now included in § 2(a)(1) of the 1974 Act (45 U.S.C. § 231a(a)).[9] In addition, a 1966 amendment added a provision, as § 3(j)(1) of the 1937 Act (80 Stat. 1073), for the payment of supplemental annuities (over and above the amount of the annuities normally payable) to individuals who, among other things, had 25 or more years of service and had attained age 65. Those provisions of the 1937 Act (45 U.S.C. § 228c(j)(1)) are included in § 2(b)(1) of the 1974 Act (45 U.S.C. § 231 a(b)(1)) as revised to permit the payment of supplemental annuities also to otherwise eligible individuals

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[9] Section 2(a)(1) of the 1974 Act also adopted and continued those aspects of § 2(a) of the 1937 Act as amended under which employees with 10 or more years of railroad service may qualify for a reduced annuity upon attaining age 62 and for a disability annuity regardless of age or years of service if disabled from engaging in any regular employment, not simply their railroad occupation.

with 30 or more years of service who have attained age 60.

(3) The primary purpose of the railroad retirement system to provide retirement benefits for career railroad employees also historically has been reflected in provisions that favor individuals who maintained an employment relationship or current connection with the railroad industry. Indeed, such provisions are traceable, at least in part, to one of the reasons assigned by this Court in the *Alton* case for holding the Railroad Retirement Act of 1934 to be unconstitutional. See n. 1, p. 3, *supra*, and accompanying text.

Among other things, the 1934 Act made "eligible for pensions all who were in carrier service within one year prior to its passage, irrespective of any future reemployment." 295 U.S., at 348. This included persons who had permanently left railroad service, whether because discharged for cause or to take employment in some other industry, as well as those who were "merely on furlough" from railroad service or "temporarily relieved from duty subject to call . . . ." *Ibid.* The majority concluded that it was "arbitrary in the last degree," and thus a violation of Due Process, "to place upon the carriers the burden of gratuities to thousands who have been unfaithful and for that cause have been separated from the service," or who otherwise were permanently separated from railroad employment before the statute was enacted. *Id.*, at 349. And while the four dissenters (Chief Justice Hughes, joined by Justices Brandeis, Stone and Cardozo) disagreed with all the other bases for the *Alton* decision, they agreed that it was "arbitrary and beyond the power of Congress" to require the payment of annuities to persons who had "been discharged for cause" or had otherwise "left the service and may not return." *Id.*, at 389.

That defect was remedied in the 1937 Act by provisions under which only employees on the enactment date could receive credit for prior service [10] (§ 3(b), 50 Stat. 310); but "employee" was defined to include both persons actually engaging in railroad service for compensation and those having an "employment relation" with a carrier (§ 1(b), 50 Stat. 308); and an "employment relation" was defined generally to include persons on furlough subject to recall or on leave of absence, in accordance with the established rules and practices of the employing carrier (§ 1(d), 50 Stat. 308). In a 1946 amendment (60 Stat. 725), however, the definition of "employment relation" was revised, principally by eliminating the reference to persons on furlough and to include persons "in the service of an employer after the enactment date and before January 1946 in each of six calendar months, whether or not consecutive . . . ." Section 1(d) of the 1937 Act as so revised (45 U.S.C. § 228a(d)) is included in the 1974 Act as § 1(e) (45 U.S.C. § 231(e)).[11]

The Congress so revised the definition of "employment relation" because the initial definition had worked in a manner deemed to be "unjustifiable by standards of equity" in that some persons were denied credit for pre-enactment service even though they "had not gone into other employment, still considered themselves part of the railroad industry, expected to return when employment improved, and did in fact return in seniority order when the industry required their services," while some of the

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[10] The term "enactment date" was defined in § 1(j) of the 1937 Act to mean August 29, 1935 (50 Stat. 309, 45 U.S.C. § 228a(j)). That was the enactment date of the 1935 Act (49 Stat. 967), which contained generally similar provisions in §§ 1(b) and (d) (49 Stat. 968).

[11] The provisions in the 1937 Act defining "employee" (45 U.S.C. § 228a(b)) and governing the credit of prior service (45 U.S.C. § 228c(b)) are included in the 1974 Act as § 1(b) (45 U.S.C. § 231(b)) and § 3(i)(3) (45 U.S.C. § 231b(i)(3)).

persons who could receive credit for pre-enactment service "had actually left the railroad industry and . . . never returned to it." S. Rept. No. 1710, 79th Cong., 2d Sess. (1946), at 7-8. The Congress sought to "correct both" inequities "by extending prior service credit to those who have returned and served for at least 6 months" while denying such "credit to those who had left the industry and have made no contribution." *Ibid.*

The 1946 amendments also introduced into the 1937 Act the related concept of a "current connection with the railroad industry," which as defined in § 1(o) of the amended Act (60 Stat. 726) generally required at least 12 months of railroad service during the 20 months preceding the individual's retirement or death. Among other things, the 1946 amendments made the existence of a "current connection" a prerequisite for the payment of benefits to survivors of a deceased employee under § 5 of the amended Act (60 Stat. 729) and for the payment of benefits to employees disabled for work in their regular railroad occupation under § 2(a) of the 1937 Act as revised by the 1946 amendments (60 Stat. 727; see p. 8, *supra*). Murray W. Latimer, then the Chairman of the Railroad Retirement Board, testified that the "current connection" requirement "attempted to divide persons who have worked in the railroad industry" between those "who are regular railroad employees and those who are not." [12] While it "attempts to substitute another concept for the concept of employment relation," it "has the same aim in view," and was proposed because the "definition of 'employment relationship' . . . would not easily be applicable to a continuing situation" and would be very difficult to administer.[13]

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[12] Hearings on H.R. 1362 before the House Committee on Interstate and Foreign Commerce, 79th Cong., 1st Sess. (1946), at 168.

[13] Hearings on H.R. 1362, *supra* at 49, 168-169.

The 1937 Act continued thereafter to require a "current connection" as defined in § 1(o), 45 U.S.C. § 228a (o), with respect both to eligibility for survivor benefits under § 5, 45 U.S.C. § 228e, and to eligibility for certain disability benefits under § 2a, 45 U.S.C. § 228b(a). And, when the Congress amended the 1937 Act in 1966 to provide for the payment of a supplemental annuity to certain long-term railroad employees (see p. 6, *supra*), a "current connection" was made one of the eligibility requirements therefor (§ 3(j)(1), 80 Stat. 1073). All of those aspects of the 1937 Act were carried over into and are now part of the 1974 Act. A "current connection" is defined in § 1(o) (45 U.S.C. § 231(o)); and is required as to disability benefits under § 2(a)(1)(iv) (45 U.S.C. § 231a(a)((iv)), as to a supplement annuity under § 2(b)(1) (45 U.S.C. § 231a(b)(1)), and as to survivor annuities under § 2(d)(1) (45 U.S.C. § 231a (d)(1)).

B. The Windfall Dual Benefit Problem and the Report of the Commission on Railroad Retirement.

(1) While the railroad retirement system always has been separate from the social security system as to both the benefits payable and the taxes imposed to finance those benefits, in time the two systems were partially coordinated so that the railroad retirement system in essence consisted of a level of benefits and taxes generally equivalent to those paid or imposed by the social security system and a second or "staff" level providing additional benefits and imposing additional taxes. Insofar as the 1937 Act was concerned, this partial integration largely was accomplished by 1951 amendments that generally guaranteed a minimum level of railroad retirement benefits equivalent to what social security would pay (see pp. 4-5, *supra*) and that provided for a financial interchange between the two systems (65 Stat. 687).

Under the financial interchange, the railroad retirement system turns over to the social security system that portion of railroad retirement taxes equivalent to what social security would have collected and receives back from social security amounts equivalent to whatever additional benefits that that system would have paid, if railroad employment were included within the social security system. See CRR Report, at 8.[14]

(2) Individuals could continue to qualify for benefits under both systems, however, both in their own right and as spouses or survivors, through employment—for both railroads and for other businesses (or self-employment) covered by social security—sufficient to meet the minimum length-of-service requirements of both the railroad retirement system (10 years of railroad service) and the social security system (generally 40 quarters of employment). Upon retirement, therefore, such individuals were paid benefits for which they were otherwise qualified by both the railroad retirement and the social security systems.

There is nothing inequitable, of course, in the payment of benefits under both systems to persons who qualify under both systems by reason of work for both railroad and nonrailroad employers. That continues to be done after, as well as before, enactment of the 1974 Act. The problem was that, before the 1974 Act more fully coordinated the social security level of benefits under the

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[14] Thus, with respect to an individual who had both railroad and nonrailroad service, the social security system deducts the amount it actually pays him on the basis of his nonrailroad service and credits the railroad retirement system with the remainder. If he had only railroad service, the full amount of what social security would have paid on the basis of that service is credited to the railroad retirement system. The financial interchange was provided for in § 5(k)(2) of the amended 1937 Act, 45 U.S.C. § 228e(k)(2), and is now provided for in § 7(c)(2) and (3) of the 1974 Act, 45 U.S.C. § 231f(c)(2) and (3).

two systems, the weighting of the formula under which social security benefits are computed resulted in dual beneficiaries receiving total social security level benefits that substantially exceeded the benefits that social security would have paid on the basis of combined railroad and nonrailroad service.[15]

It was that excess or "windfall" amount which the Commission on Railroad Retirement identified and condemned as inequitable. See, *e.g.*, CRR Report, at 4, 8-9, 24, 353-355. "Windfalls in dual benefits seriously distort the benefit system for railroad workers and their families. They cause workers who serve the railroad industry for shorter periods to receive higher combined RR/OASDI benefits for their contribution dollar than career workers who spend their entire lives in the industry." CRR Report, at 355. The Congress that enacted the 1974 Act agreed that such windfall dual benefits "are inequitable in the sense that a minority of railroad em-

[15] Under the Social Security Act, benefits as compared to service and compensation are comparatively higher in regard to relatively short service and low wage employees than in regard to those with relatively long service and high wages; however, artificial distortions are avoided by combining service for and compensation from all employers subject to the Act in computing both benefits and taxes. On the other hand, the social security portion of railroad retirement benefits was computed on the basis of railroad service alone, rather than on the basis of all employment and compensation, so that the effect of the weighting of the social security benefit formula was artificially enhanced. See, *e.g.*, CRR Report, at 112-113, 128-129, 349-350, 474. To give a simplified hypothetical example, if 10 years of service under social security would produce a monthly benefit of $300, an additional 10 years under that system at the same level of creditable compensation would not double that benefit, but would increase it by some lesser amount to, say, $500. If that 20 years of service had been divided equally between railroad and nonrailroad employment, however, the social security benefit would be $300 and the social security component of the railroad retirement benefit would also be $300, for a total social security level benefit of $600, since in each instance the weighted social security formula would be applied to only 10 years of service. The $100 difference in the example constitutes the "windfall."

ployees receive an advantage not available either to the majority of career railroad employees—those who spend their entire working life in the railroad industry—or to employees in other private industries." [16]

The windfall dual benefit problem was not limited, moreover, to those artificial and inequitable distortions in the amounts of social security level benefits. Even though those windfall amounts resulted from non-railroad employment of railroad employees and from the social security benefit formula, under the financial interchange the entire cost of such excess or windfall benefits was borne by the railroad retirement system.[17] By 1974, the cost to the railroad retirement system was "in excess of $4 billion," and was responsible for 7.72% of the 9.05% (of taxable payroll) actuarial deficit in the railroad retirement account,[18] so that it was primarily those costs which "threaten[ed] the existing system with bankruptcy." [19]

(3) Because of concern about the solvency of the railroad retirement system (see CRR Report, at 5), when the Congress in 1970 enacted a 15% general increase in the level of benefits payable, it also established the Commission on Railroad Retirement to conduct a study of the system "for the purpose of recommending to the Congress on or before July 1, 1971, changes in such system to provide adequate levels of benefits . . . on an

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[16] H. Rept. No. 93-1345, 93d Cong., 2d Sess. (1974), at 11; S. Rept. No. 93-1163, 93d Cong., 2d Sess. (1974), at 11. Hereinafter, in instances where those committee reports on the bill enacted as the 1974 Act are identical (or substantially identical) in substance and in pagination, they will be jointly cited as "Committee Reports" together with the page or pages appropriate to both.

[17] Committee Reports, at 2-3; CRR Report, at 8-9, 24, 73, 129-130, 344.

[18] Committee Reports, at 2, 7-8.

[19] Committee Reports, at 1-2; see, also, *id.*, at 7-8.

actuarially sound basis" (84 Stat. 791, 793), and it provided that the 15% increase was to expire on June 30, 1972. A 1971 statute (85 Stat. 101) allowed the Commission an additional year, until June 30, 1972, in which to make its report; enacted a further 10% general increase in the level of railroad retirement benefits; and provided that both that increase and the earlier 15% increase would expire on June 30, 1973.

The Report of the Commission on Railroad Retirement (see p. 4, *supra*), dated June 30, 1972, already has been referred to from time to time herein. Among other things, it identified "dual benefits and their attendant windfalls" as a "key problem," the solution of which "is crucial because it involves heavy costs and large considerations of equity, and also reflects a major structural imperfection in the system." CRR Report, at 24. The Commission recommended that future accruals of windfall benefits be eliminated by establishment of a two-tier system. The first tier would consist of social security benefits (and taxes), to be provided by making the Social Security Act (and FICA) directly applicable to railroads and their employees, so that such benefits would be computed under that Act on the basis of combined railroad and nonrailroad employment and "the excess element will automatically be eliminated." CRR Report, at 24; see, also, *id.*, at 3-4, 21-23. The second tier would consist of "a separate, supplementary railroad staff pension system," based upon railroad employment alone, "with taxes and benefits set under Federal law administered by the Railroad Retirement Board." CRR Report, at 23; see, also, *id.*, at 3-4, 21-22.

The Commission also recommended that "legally-vested rights of railroad workers and railroad retirement beneficiaries" to a windfall dual benefit be preserved. CRR Report, at 4. Under the Report's definition of "legally vested," "vested benefit" and "vesting" (pp. 552, 555),

this meant that persons already retired and receiving such a windfall as of the changeover date to the new two-tier system would continue to receive the same windfall amount, and that persons not yet retired (and their spouses and survivors) who, as of that changeover date, had sufficient railroad and nonrailroad employment to satisfy the minimum length-of-service requirements of both the railroad retirement and social security systems would, upon retirement, be paid a windfall amount based upon such service prior to the changeover date. Persons not so vested but who, by reason of both railroad and nonrailroad employment prior to the changeover had paid social-security level taxes in excess of what would have been paid under social security if applicable to a combination of that employment, would have that excess refunded by a lump-sum payment. CRR Report, at 24. In addition, the Commission recommended that the benefit formula applicable to the second tier of benefits be restructured to eliminate a "compounding" problem that threatened to "escalate costs to an untenable extent" and to correct other "anomalies" so as to "make benefits more equitable among the various groups of beneficiaries." CRR Report, at 4-5.[20]

(4) The Congress was not willing to accept or otherwise act immediately upon the Commission's recommendations. In a 1972 statute which enacted a third general increase (20%) in the level of railroad retirement bene-

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[20] The "compounding" problem generally resulted from the fact that percentage increases in the level of benefits, intended to provide more adequate benefits "for beneficiaries already on the rolls whose wage base reflects earlier years when pay rates were lower," had "also been applied to new retirees whose wage base is related to more recent, higher wages." CRR Report, at 24-25. The correction recommended in regard to relative benefits was a substantial enhancement of survivor benefits. CRR Report, at 26. The Commission also contemplated that the temporary benefit increases would "become permanent" under the restructured system. CRR Report, at 23.

fits, the Congress scheduled that increase to expire also on June 30, 1973 and expressly stated "the policy of the Congress" that the three temporary increases "can be made permanent only if at the same time a method is adopted to insure the receipt of sufficient revenues by the Railroad Retirement Account to make such Account financially solvent based on sound actuarial projections" (86 Stat. 765, 767); and the Congress called upon "representatives of employees and retirees and representatives of carriers" to submit a report, not later than March 1, 1973, of their recommendations in that regard, after "taking into account" the Commission's recommendations. And in a 1973 statute, the Congress extended the expiration date of the three temporary increases to December 31, 1974, and provided for the formal establishment of a joint labor-management railroad retirement negotiating committee to submit, not later than April 1, 1974, "their joint recommendations for restructuring the railroad retirement system in a manner which will assure the long-term actuarial soundness of such system," which recommendations "shall take into account the specific recommendations" of the Commission "and shall be specific and shall be presented in the form of a draft bill" (87 Stat. 162, 165).

C. The Enactment of the Railroad Retirement Act of 1974 and Its Solution of the Windfall Dual Benefit Problem.

(1) The Joint Labor-Management Railroad Retirement Negotiating Committee (hereinafter the "Joint Committee") reached an agreement upon the principles to be embodied in a draft bill, and so advised the Congress in an April 10, 1974 letter which outlined those principles in considerable detail.[21] A bill embodying those principles

[21] An identical letter was addressed to the Chairmen of the House Committee on Interstate and Foreign Commerce and the Senate Committee on Labor and Public Welfare. It was published in the

subsequently was drafted and submitted to the Congress where it was introduced as H.R. 15301 and S. 3612. After lengthy hearings before committees of both Houses,[22] those committees issued detailed reports (see n. 16, p. 13, *supra*) recommending adoption of the bill with some changes, and it was enacted in October of 1974 by virtually unanimous votes overriding a presidential veto.[23] While many of the features of the 1937 Act were retained (including generally the types of benefits provided and the eligibility requirements therefor), the legislation did restructure the railroad retirement system in a manner which the congressional committees concluded would place the system "on a sound financial basis." [24] Among other things, the legislation adopted a two-tier system in substance, although not in the form recommended by the Commission on Railroad Retirement,[25] and by that and other means to be discussed resolved the windfall dual benefit problem.

Congressional Record for June 10, 1974, 120 Cong. Rec. 18391, and was included in committee prints of background information. *Background Information Relating to Proposed Changes in the Railroad Retirement System*, House Committee Print No. 24, 93d Cong., 2d Sess. (June 10, 1974), at 7-18; *Proposed Changes in the Railroad Retirement System, 1974, Background Material, Draft Legislation, and Recommendations Pursuant to Public Law 93-69*, Unnumbered Senate Committee Print, 93d Cong., 2d Sess. (August 1974), at 7-18.

[22] Hearings on H.R. 15301 before the House Committee on Interstate and Foreign Commerce, 93d Cong., 2d Sess. (July 25, 30, 31, and August 1, 1974), hereinafter the "House Hearings." Hearings on S. 3612 before the Subcommittee on Railroad Retirement of the Senate Committee on Labor and Public Welfare, 93d Cong., 2d Sess. (September 5 and 10, 1974), hereinafter the "Senate Hearings."

[23] See 120 Cong. Rec. 35616, 35898. Title I constitutes the 1974 Act. Title II includes transitional provisions applicable to beneficiaries who retired prior to January 1, 1975, and the remaining titles involve conforming amendments of other statutes and effective dates (generally January 1, 1975).

[24] See, *e.g.*, Committee Reports, at 1, 14, 17-18.

[25] See, *e.g.*, Committee Reports, at 18-19. The first tier is measured by what the social security system would pay on the basis of combined railroad and nonrailroad employment, while the second

(2) That was done in the context of a situation where, if "the existing system [was] permitted to continue, the Railroad Retirement system [would] be bankrupt by 1981, and there [would] be insufficient funds available to pay benefits at the present level to anyone—past, present or future beneficiaries." Committee Reports, at 7. The Congress recognized, as did the Joint Committee (120 Cong. Rec. 18391), that "[r]esolution of the so-called 'dual benefit' problem is central both to insuring the fiscal soundness of the railroad retirement system and to establishing equitable retirement benefits for all railroad employees." Committee Reports, at 11. The "fundamental step" toward resolution of the problem was the establishment of the two-tier system under which "a 'windfall' no longer will be possible except insofar as the bill expressly preserves benefits for those beneficiaries

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tier is based on railroad service alone. However, both tiers are part of the railroad retirement system, rather than the first tier being placed directly under social security, and the benefits actually paid by social security on the basis of nonrailroad employment are deducted so as to prevent duplication. The 1974 Act also adopted a new benefit formula for the second tier which, as the Commission had recommended, had the effect of eliminating the "compounding" problem and of making permanent the three temporary increases in benefit levels (see n.20, p. 15, *supra*) amounting to "about 52% on a cumulative basis" (Committee Reports, at 19-20); and it enhanced the level of survivor benefits (in general, from 110% to 130% of the social security level) for both existing and future beneficiaries, as recommended by the Commission, and broadened an early-retirement provision adopted in 1973 (*id.*, at 17, 18). Under the 1973 amendment to the 1937 Act, an employee with 30 or more years of railroad service could retire at age 60, but he was not eligible for a supplemental annuity and his spouse was not eligible for a spouse annuity until he was 65. Since those limitations had proven to be a "significant deterrent" to effectuation of the purpose of the 1973 amendment to encourage early retirement by long-service railroad employees, the Joint Committee recommended (see, *e.g.*, 120 Cong. Rec. 18392-18393) and the 1974 Act contains provisions under which a supplemental annuity also is payable to such an early retiree (§ 2(b)(1)(i), 45 U.S.C. § 231a(b)(1)(i)), and a spouse annuity may be paid to his spouse (§ 2(c)(1)(i), 45 U.S.C. § 231a(c)(1)(i)).

and employees whose equities entitles them thereto." *Ibid.* The "most difficult problem" was the "manner in which dual benefits should be phased out on an equitable basis." *Ibid.*

The Committee Reports (at pp. 11-12) carefully described the 1974 Act's solution of that "most difficult problem" as follows:

> "First, the dual benefits of beneficiaries on the rolls as of January 1, 1975 would continue to be paid in full. However, the [windfall] portion of those dual benefits . . . would not be subject to future increases in the level of social security benefits. In effect, therefore, the amount of that portion will be frozen as of December 1, 1974. This is the approach recommended by the Commission on Railroad Retirement.
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> "Second, employees without sufficient railroad and non-railroad service and compensation by December 31, 1974 to have fully qualified under both systems would not be entitled to a [windfall] dual benefit. . . . In addition, however, such an employee upon retirement (or his survivors if he should die before retirement) would be entitled to a lump-sum refund of employment taxes paid under the Railroad Retirement and Social Security Acts prior to January 1, 1975 in excess of what would have been paid if all of his employment prior to that date had come under the Railroad Retirement Act. Again, this is what the Commission on Railroad Retirement recommended.
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> "Third, employees who have sufficient service and compensation to be fully qualified under both systems but who have not retired prior to January 1, 1975 would be divided into two classes or groups.
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> "The first group would be comprised of those employees with a 'current connection' with the railroad industry—12 months of railroad service out of the

previous 30 months, as defined in the 1937 Act and in the bill—either as of December 31, 1974 or as of the date of retirement, and also of those employees with 25 years or more of railroad service [as of January 1, 1975] even though without such a 'current connection.' This group also would receive, upon retirement, a [windfall] dual benefit based upon service and compensation prior to January 1, 1975. The amount thus determined . . . would be subject to increase prior to retirement by reason of cost-of-living increases in the level of social security benefits during that intervening period, but would be frozen upon retirement, as would be the case of dual beneficiaries retired as of December 31, 1974.

"The second group would be composed of employees who, after qualifying for benefits under the Railroad Retirement Act, left the railroad industry without having 25 years of railroad service and who do not now have a current connection to the railroad industry. Under the bill, they would not receive a [windfall] dual benefit upon retirement, unless they also had fully qualified under Social Security by the close of the year prior to 1975 in which they left railroad service (although they would be entitled to the lump-sum benefit refunding excess employment taxes paid). If they had so qualified under both systems at that point, however, they would receive [windfall] dual benefits, upon retirement, calculated as of the time they left railroad service, and subject to cost-of-living increases in the level of social security benefits after 1974 and prior to retirement. The excess benefit would be frozen upon retirement, as in the case of other dual beneficiaries.

"The bill also contains generally similar provisions for terminating or phasing out [windfall] dual benefits of spouses and survivors of railroad employees."

In its April 10, 1974 letter to the Congress, the Joint Committee similarly outlined its recommended solution

of how windfall dual benefits should be phased out (which recommendation was approved by the congressional committees and enacted by the Congress) as between the same three classes of employees, the third of which was divided into two groups. 120 Cong. Rec. 18391-18392. The Joint Committee also informed the Congress, in that letter, that the recommended solution in regard to that third class "differ[ed] from the Commission's" in thus dividing it into two groups; and that while the first such group was believed to be "entitled to be in the same situation" as persons who had retired as of the changeover date, the second group "have a less strong equitable claim than those who have remained with the industry" so that they should receive a preserved windfall benefit, upon retirement, only if they had qualified under both systems as of the end of the year in which they left railroad service. 120 Cong. Rec. 18392.[26]

(3) That solution is, of course, reflected in the bill enacted in 1974. With respect to employees in the first classification—those who retired prior to the changeover date—any windfall amount as of that date is preserved by §§ 204(a)(3) and (4).[27] With respect to employees

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[26] The Section-by-Section Analysis of the Bill, contained in the Committee Reports, includes even more detailed explanations of the windfall provisions (pp. 38-39, 42-43 (or 43-44), 44 (or 45), 47-48, 59, 60 (or 61)). The three classifications established in that regard, including the division of the third classification into two groups, also were explained in the testimony of William H. Dempsey (House Hearings, at 167-169; Senate Hearings, at 340-345) and of C. L. Dennis (House Hearings, at 221; Senate Hearings, at 293). Mr. Dempsey, who was then Chairman of the National Railway Labor Conference, was the chairman of the management members of the Joint Committee. Mr. Dennis, who was then President of the Brotherhood of Railway and Airline Clerks, was the chairman of the labor members of the Joint Committee and was one of the members of the Commission on Railroad Retirement.

[27] 88 Stat. 1353. The transition provisions in Title II of the bill are not included in the U. S. Code. Any windfall amount of spouses and survivors on the beneficiary rolls as of January 1, 1975 are

in the second classification—unretired employees who had not qualified under both systems as of the changeover date—no provision preserves a windfall amount, so that none is payable upon retirement to such persons, their spouses or survivors. With respect to employees in the third classification—unretired employees who had qualified under both systems as of the changeover date—the further division of that class into two groups is reflected in § 3(h), 45 U.S.C. § 231b(h). Under §§ 3(h)(1) and (3), any windfall amount as of the changeover date is preserved for such employees if they had railroad service in 1974 or 25 or more years of railroad service by that date or a current connection either as of that date or when they retired; and under §§ 3(h)(2) and (4), for such employees that do not meet any of those three requirements but were qualified under both systems by the end of the year they left railroad service, any windfall amount as of the end of that year is preserved.[28] The lump-sum payment refunding excess taxes to employees who do not have a windfall amount preserved is provided under § 5(d), 45 U.S.C. § 231e(d).

One of the three circumstances which, under §§ 3(h)(1) and (3), entitles an unretired employee, upon retirement, to a preserved windfall amount as of the changeover date—some railroad service in 1974—essentially is redundant.[29] Thus, the Congress fundamentally

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preserved by §§ 206(3) and 207(3), 88 Stat. 1355, 1356. All such preserved windfall amounts are excluded from future cost-of-living increases, equivalent to those afforded by social security, provided under § 209(a), 88 Stat. 1357.

[28] The preserved windfall amounts are increased by percentages equivalent to cost-of-living increases in social security benefits, between January 1, 1975 and the date of retirement, under § 3(h)(5). Similar provisions in regard to the spouses and survivors of such employees are contained in §§ 4(e) and 4(h), 45 U.S.C. §§ 231c(e) and (h).

[29] An employee who left railroad employment after some service in 1974 would be entitled to precisely the same preserved windfall amount under §§ 3(h)(2) and (4), since under those provisions

distinguished between the two groups in the third classification on the basis of whether they had either 25 or more years of railroad service or a current connection with the railroad industry as of the changeover date or upon retirement. Both the long-term railroad service reflected in the 25-year provision and the continued attachment to the railroad industry reflected in a current connection are circumstances that the Congress historically has regarded as justifying favored treatment under the railroad retirement system, as is shown by numerous provisions of the 1937 Act which generally also were carried over into the 1974 Act. See pp. 4-10, *supra.*

The Congress also provided, in § 15(d) of the 1974 Act, 45 U.S.C. § 231n(d), for appropriations out of the General Treasury over a 25-year period of amounts sufficient to pay the future costs of the windfall benefits thus preserved, as offset by additional interest earned by the Railroad Retirement Account by reason of a change in investment policies provided in § 15(e) of that Act, 45 U.S.C. § 231n(e). In general, the Congress concluded that it primarily was at fault in permitting the windfall dual benefit problem to arise, and that it would be inequitable to require the railroads, who received no advantage from the social security employment that gave rise to the windfalls, or the employees, who would be debarred from future accruals of windfalls, to bear

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he had until the end of the year in which he left railroad service to qualify under both systems and the preserved windfall amount is calculated as of the end of such year. And, of course, if he continued in railroad service through 1974, such an employee would have a current connection as of January 1, 1975. This redundancy explains why the circumstance of some railroad service in 1974 was not mentioned in the summary of the windfall provisions in the Committee Reports, quoted on pp. 19-20, *supra*, or in the April 10, 1974 letter. That circumstance, as well as the others, was specifically mentioned in the section-by-section analyses (Committee Reports, at 38-39).

those phaseout costs through future payments of employment taxes. See, *e.g.*, Committee Reports, at 2-7.

D. The Decision Below.

(1) The District Court conceded that this case "does not involve the deprivation of a fundamental right or . . . discrimination against a suspect class," so that the claimed deprivation of equal protection of the laws in violation of the due process clause of the Fifth Amendment must be judged by the "rational basis test." C. 5-7, J.S. App. 28a. But the District Court also concluded that there was no rational basis for the denial in the 1974 Act of a preserved windfall dual benefit to what that court characterized as the "Plaintiff Class."

The "Plaintiff Class" was said to consist of persons with between 10 and 25 years of railroad service as of December 31, 1974 who were qualified or "vested" as of that date under both the railroad retirement and social security systems, but who neither had a current connection with the railroad industry as of that date nor worked for the railroad industry in 1974. It was contrasted by the trial court with a class or group of persons who had the attributes of the "Plaintiff Class" and also either had a current connection as of December 31, 1974 or who had worked for the railroad industry in 1974. C. 2, J.S. App. 27a. The distinction made by the Congress between that class and the "Plaintiff Class" was said to be based solely upon whether or not the individual concerned was "active" with the railroads in 1974. C. 4, J.S. App. 27a-28a. In addition to ignoring completely the first two classes distinguished by the Congress,[30] the "Plaintiff Class" thus distinguished by the lower court

[30] *I.e.*, (1) those persons who had retired prior to January 1, 1975 and (2) those unretired persons who were not qualified under both systems prior to January 1, 1975. See pp. 21-22, *supra*.

does not accurately reflect the manner in which the Congress divided its third class into two groups.[31]

In any event, the District Court concluded that the "rationality of a statutory classification is tested against the actual purpose of the statute and not against a purpose created . . . after-the-fact;" that the purposes of the 1974 Act "were to place the Railroad Retirement Fund on a sound actuarial basis and to protect completely the rights of those persons" who were qualified or "vested" under both systems as of December 31, 1974; and that the discrimination against the "Plaintiff Class" is "not rationally related" to either purpose. C. 8, 9 and 19, J.S. App. 28a, 30a. The District Court attempted to buttress the latter conclusion by conclusions regarding other "factors bearing adversely on the rationality of a statutory discrimination between similar situated persons" (J.S. App. 30a). In its opinion, other methods of resolving the "financial difficulties" of the railroad retirement system were available and preferable (C. 14, J.S. App. 29a); there was "reasonable reliance of the Plaintiff Class" on receiving a windfall benefit upon retirement (C. 15, J.S. App. 29a-30a); the union representatives on the Joint Committee breached a "duty of fair representation owed plaintiff's class" which "was sanctioned by Congress" in enacting the 1974 Act (C. 16, J.S. App. 30a); and the "Congress was unaware" that the 1974 Act "adversely affected the Plaintiff Class" (C. 17 and 18, J.S. App. 30a).

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[31] The basic distinction made by the Congress in regard to unretired persons who had qualified under both systems prior to January 1, 1975 was not between those who were "active" in 1974, in the sense of having had railroad service in that year or a current connection at the end of that year, and those who were not so "active," but between those who either had 25 or more years of railroad service as of the end of that year or a current connection either as of the end of that year or when they retired and those who neither had such long-term railroad service nor such a current connection with the railroad industry. See pp. 22-23, *supra*.

(2) We will demonstrate the legal defects in or irrelevancy of those conclusions in our Argument. This appears to be the most appropriate place, however, to comment upon the factual errors underlying certain of those conclusions which, together with related findings, cast completely unwarranted aspersions upon representatives of the railroads and the unions who participated in the proceedings of the Joint Committee.[32]

With all due respect to the District Court, its conclusions to the effect that a purpose of the 1974 Act was "to protect completely" the rights to a windfall benefit of all persons who were qualified or "vested" under both systems as of December 31, 1974, and that the "Congress was unaware" that the "Plaintiff Class" would be denied a preserved windfall benefit, are nonsensical. Those conclusions are contradicted not only by the language of the bill which the Congress enacted, but also by the committee reports which explained what was being done in detail, including identification of the classes of persons affected and the circumstances in which they would and would not be entitled to a preserved windfall amount, together with an explanation of the nature and extent of that benefit when preserved. That was done not only in the general discussion of the bill's solution of the windfall dual benefit problem quoted at pp. 19-20, *supra*, but also in the section-by-section analyses of the provisions of the bill (see n. 26, p. 21, *supra*). To be sure, those reports contain general statements which in themselves do not spell out all of the distinctions made in the legis-

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[32] In addition, we note that the lower court's rulings to the effect that the discrimination against the group that includes the "Plaintiff Class" is not rationally related to the purpose of the Congress to place the railroad retirement system on an actuarially sound financial basis is erroneous factually, as well as legally, as it ignores the conclusion of the Congress that terminating windfall dual benefits was "central" to the achievement of that purpose. See pp. 18-19, *supra*.

lation, such as those quoted in F. 63-65 (J.S. App. 22a-24a), but that common occurrence does not in any way detract from the fact that the specific discussions of the windfall provisions demonstrate that the Congress both knew and intended exactly what the 1974 Act provides in that regard and that the group which includes the "Plaintiff Class" therefore would be adversely affected by those provisions.

The related finding of the trial court to the effect that members of the Joint Committee, and particularly Mr. Dempsey, misled the Congress in testimony on the recommended bill to "believe that the plaintiff class was protected by the" 1974 Act (F. 52, J.S. App. 15a) is a complete distortion of the legislative record, even apart from the fact that the Congress obviously was not so misled.

The language of § 3(h) of the bill before the Congress, which the Joint Committee had drafted at the direction of the Congress, itself made abundantly clear that the members of the group that included the "plaintiff class" would not be entitled to a preserved windfall benefit unless they had qualified under both systems by the end of the year in which they left railroad service. That was also made clear in the April 10, 1974 letter from the Joint Committee to the Congress, which was printed in the Congressional Record and also made available by the congressional committees as part of the background information to be considered by their members and other congressmen in passing upon the bill. See n. 21, p. 16, *supra*. It was again made clear in the written statement submitted by Mr. Dempsey to the congressional committees as a part of his testimony, as is revealed by the partial quotation from that statement in Finding 53, J.S. App. 17a-19a.

The lower court attempted to denigrate that statement by asserting that it "euphemistically refers to the dis-

crimination against the plaintiff class as a 'refinement' " and "inaccurately defines the persons whose vested interests were protected since it fails to disclose that persons who worked for the railroads even one day in calendar year also received their full benefits." J.S. App. 19a. Whether or not "euphemistic," the "refinement" was "upon the recommendations of the Commission on Railroad Retirement" and was believed by the Joint Committee "to be desirable in order to reflect more accurately the comparative equities of the two groups." J.S. App. 18a. More importantly for present purposes, that reference did not in any way obscure the disclosure by Mr. Dempsey that the group which includes the "plaintiff class" would not be entitled to a preserved windfall except as they had qualified under both systems at the end of the year in which they left railroad service. That is also true of the alleged inaccuracy, which in any event simply involved a failure to mention a redundancy (see n. 29, p. 22, *supra*) and did not affect any member of the "plaintiff class."

The lower court also asserted that the explanation in Mr. Dempsey's written statement "was refuted by the oral testimony" set out in Finding 52. J.S. App. 17a-18a. Rather than "refuting" his written statement in his oral testimony, Mr. Dempsey explained that it was lengthy and "very detailed," so that instead of entrenching on the committees' time by reading the statement, which in any event "the members of the committee and the staff can do . . . much better" for themselves, he would focus his oral testimony on a more generalized discussion of what he regarded as the main or key issues. House Hearings, at 181; Senate Hearings, at 308. And, in fact, none of the excerpts in Finding 52 (J.S. App. 15a-17a) from Mr. Dempsey's testimony purported to give a de-

tailed explanation of the manner in which windfall benefits would be phased out.[33]

The lower court's conclusion, and related findings, to the effect that the unions breached their duty of fair representation to the "plaintiff class" and thus would have violated the law, if such breach had not been sanctioned by the Congress in enacting the 1974 Act, is equally fallacious. Even if the duty of fair representation had been applicable, which it was not,[34] it would not have been breached.

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[33] The colloquy between Mr. Dempsey and Representative Dingell did not relate to windfall benefits, but was part of Mr. Dempsey's discussion of the new benefit formula for Tier II (see n.25, p. 17, *supra*). Mr. Dempsey was explaining why that new formula would reduce the actuarial deficit, even though it would result in benefits as large or larger than those currently being paid under the 1937 Act—primarily because of its elimination for the future of the "compounding" problem which the Commission on Railroad Retirement had pointed out (see n.20, p. 15, *supra*). See House Hearings, at 199; generally, at 197-205. The next excerpt is simply a generalized statement made by Mr. Dempsey in the course of explaining his views as to the manner in which the costs of phasing out windfall benefits should be funded (*see id.*, at 209-216), and Mr. Dempsey's colloquy with Senator Hathaway, as is apparent on its face, sets forth Mr. Dempsey's reasons for objecting to the Senator's suggestion that the number of qualifying years be increased. Of course, the number of qualifying years required by existing law was utilized in the 1974 Act with regard to the group that includes the "Plaintiff Class" as well as with regard to the other classes or groups affected, and adoption by the Congress of the Senator's suggestion would have reduced the number of persons entitled to a preserved windfall amount both as to that group and generally.

[34] That duty is imposed by the Railway Labor Act and the National Labor Relations Act upon the "exclusive bargaining representative of the employees" in a bargaining unit with respect to the representation of those employees in collective bargaining and in enforcing bargaining agreements. *Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967). The Joint Committee was not established pursuant to either of those Acts. Even if it had been, the union members would not have represented persons outside of the bargaining unit, such as former railroad employees including the members of the "Plaintiff Class." *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 157, 171-175 (1977).

The asserted breach was an alleged agreement by the union representatives "during the critical negotiations to deprive the plaintiff class of their 'vested benefits' in exchange for liberalized benefits for others" (C. 16, J.S. App. 30a). Those "liberalized benefits" are the increase in the level of survivor benefits, as recommended by the Commission on Railroad Retirement, and the broadening of an early retirement provision to make it more effectual. See F. 40, J.S. App. 11a-12a, and n. 25, p. 17, *supra*. The members of the "plaintiff class" (or their survivors) are not excluded from qualifying for such liberalized benefits and, as Mr. Dempsey made clear to the Congress, "they are either right or wrong on their own merits" and should be so judged by the Congress and not "confuse[d] in some way . . . with the phase-out dual benefit question." Senate Hearings, at 318; generally, at 317-318. And even if there had been a tradeoff in that regard, that would be permissible under the duty of fair representation.[35]

The Joint Committee, including its union members, was faced with a very difficult problem. Temporary general increases amounting to a cumulative 52% in existing benefit levels would expire at the end of 1974 unless new legislation was enacted, and there were predictions that the entire railroad retirement system would be bankrupt by 1981 unless something were done. In reaching agreement on proposed legislation that remedied those problems, the union greatly benefitted the members

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[35] A union does not violate the duty of fair representation by "taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another." *Humphrey* v. *Moore*, 375 U.S. 335, 349 (1964). "The complete satisfaction of all who are represented is hardly to be expected" and a "wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents . . . ." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953).

of the "plaintiff class" as well as other retirees and potential retirees. The increased survivor benefits apply to all eligible survivors, including those already on the beneficiary rolls, and thus advantage the survivors of the members of the "plaintiff class" as well as others. In phasing out windfall dual benefits, the class most advantaged—those who retired prior to January 1, 1975—were no longer members of the unions, while the class most disadvantaged—unretired employees who had not qualified under both systems—made up the generality of the unions' current membership, so that factor obviously had nothing to do with the recommended legislation. And, the group which included the "plaintiff class," even though they had left railroad service, were given a preserved windfall if they had qualified under both systems by the end of the year they left such service and in any event if they returned to railroad service thereafter so as to have a current connection when they retire. And, if not entitled to a preserved windfall, they are entitled to a refund of excess employment taxes paid.

In short, the unions, like the carriers, made a good faith effort to accommodate the various interests involved so as to reach a reasonable settlement of an extremely difficult and complex problem. Whether or not that was the best of all possible settlements, it is highly unfair to characterize those efforts as a breach of the duty of fair representation. Such a characterization, if allowed to stand, can only make more difficult future efforts by the carriers and unions to resolve railroad retirement and other issues through compromise agreements which by their very nature cannot possibly fully satisfy the desires of everyone affected.

ARGUMENT

The Government has demonstrated in the Jurisdictional Statement that the Court has jurisdiction of this appeal and that the decision below gives rise to a substantial constitutional issue which should be reviewed by the Court. In this *amicus* brief, we shall elaborate upon and emphasize the Government's suggestion (J.S. at 24) that the "Court may wish to consider summary reversal." We believe that the decision below is so erroneous and the constitutionality of the provisions of the 1974 Act in question is so plain, under constitutional principles firmly established by this Court, that a summary reversal is the most appropriate disposition of the case, thereby enabling the Court to conserve its time for use in cases involving more doubtful issues.

1. "Like Social Security . . ., railroad retirement benefits are not contractual," so the "Congress may alter, and even eliminate, them at any time" without violating the Constitution. *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 575 (1979). We assume that it is also true of railroad retirement, as it is of social security, that the Congress may not "exercise its power to modify the statutory scheme free of all constitutional restraint," in that the equal protection of the laws protected by the Due Process Clause of the Fifth Amendment must be afforded; but the "Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960). See also, *e.g.*, *Weinberger* v. *Salfi*, 422 U.S. 749, 768 (1975); *Richardson* v. *Belcher*, 404 U.S. 78, 80-81 (1971).[36]

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[36] Both *Salfi* and *Belcher* point out, among other things, that a Federal statute "is perforce consistent with the due process requirement of the Fifth Amendment" if it would satisfy the standards applicable to the States under the Equal Protection Clause of the Fourteenth Amendment. See 422 U.S., at 770; 404 U.S., at 81.

2. The District Court was obviously correct in holding that this case "does not involve the deprivation of a fundamental right . . . or discrimination against a suspect class." See p. 24, *supra*. Hence, the statutory classification adopted by the Congress in the 1974 Act does not violate equal protection unless the "varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979). In determining whether such a rational basis exists, it is necessary to begin "with the statutory classification itself," *Califano* v. *Boles*, —— U.S. ——, 47 U.S.L.W. 4874, 4877 (1979), and the "broad legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." *California* v. *Jobst*, 434 U.S. 47, 55 (1977).[37]

The rationality of the statutory classification at issue here is plain when considered in the light of the background and history of the 1974 Act which we have set forth in our Statement of the Case. Very generally, the Congress was faced with the prospect that the railroad retirement system would be bankrupt within a few years, and thus unable to pay benefits to anyone, unless something was done to restructure the system on a sound financial basis. It concluded that the principal cause of the system's financial difficulties, and the key to solving that problem as well as to providing a more equitable system of benefits, was the windfall dual benefit situation. Such windfall benefits not only were inequit-

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Hence, in our further discussion, we rely upon decisions by this Court under the Fourteenth, as well as those under the Fifth, Amendment.

[37] Hence, the District Court erred in focusing upon a "Plaintiff Class" that differed in characteristics from the statutory classification adopted by the Congress. See pp. 24-25, *supra*.

able in themselves, but their cost was borne entirely by the railroad retirement fund even though they resulted from employment covered by the social security system. See pp. 11-13, 18, *supra.*

Thus, it unquestionably was proper for the Congress to enact legislation for the purpose of restoring and protecting the financial integrity of the railroad retirement system which it established,[38] and to restructure that system so as to coordinate it with the social security system—which the Congress also had established—in a manner that would remedy the windfall dual benefit problem. See, *e.g.*, *Richardson* v. *Belcher*, *supra* at 82-84. That could have been done by terminating windfall benefits altogether (see p. 32, *supra*), but a "gradual approach to the problem is not constitutionally impermissible." *New Orleans* v. *Dukes*, 427 U.S. 297, 305 (1976). In that case, the Court upheld a "grandfather provision" in an ordinance terminating the sale of foodstuffs by pushcart vendors, which excepted those vendors that had engaged in that business for eight or more years. In so doing, the Court concluded that the "city would reasonably decide that newer businesses were less likely to have built up substantial reliance interest in continued operation," and for that reason, among others, the "grandfather provision" did not "so lack rationality" as to "constitute a constitutionally impermissible denial of equal protection." *Ibid.*

The determinations by the Congress as to what classes should in effect be "grandfathered" in regard to windfall dual benefits are as much or more reasonable and rational. It certainly is rational to believe that the "reliance interest" and other equities in regard to a windfall dual benefit are more substantial on the part of those who have demonstrated their attachment to and

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[38] See, *e.g.*, *Califano* v. *Boles*, *supra* at 4878; *Matthews* v. *Diaz*, 426 U.S. 67, 83 (1976); *Weinberger* v. *Salfi*, *supra* at 780.

dependence on the railroad industry by 25 or more years of service or a current connection with that industry, than on the part of those employed by the railroads for a lesser period of time who left railroad service sufficiently in advance of enactment of the 1974 Act as not to have a current connection on the changeover date and did not return to that industry so as to have a current connection when they retire.

This is particularly so since both long-term railroad service and the existence of a "current connection" (or the related concept of an "employment relation") traditionally have been factors which the Congress has considered to justify more favorable treatment under the railroad retirement system. See pp. 4-10, 22-23, *supra*, and compare *Matthews* v. *Diaz*, *supra* at 78 n. 1 and accompanying text, and *Weinberger* v. *Salfi*, *supra* at 777-780. It hardly could be otherwise under a system which from the beginning has primarily been intended to provide "benefits for persons who pursue careers in the railroad industry," so as, among other things, to "encourage older workers to retire" from the industry and thus " 'assure more rapid advancement in the service' and also more jobs for younger workers." *Hisquierdo* v. *Hisquierdo*, *supra* at 573-574. Preservation of a windfall benefit for persons, such as the members of the "Plaintiff Class," who already had permanently left railroad service and who did not return to that service before retirement would not further that purpose. And it has continued to be true, as it was when the *Alton* case was decided in 1935, that many of the persons who permanently leave railroad service before retirement do so because they were discharged for cause or preferred employment with some other industry, and thus have no substantial equitable claim to railroad retirement benefits. See pp. 7-8, *supra*.

3. It "is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,"

Fleming v. *Nestor*, *supra* at 611, as "[l]egislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them," *Schilb* v. *Kuebel*, 404 U.S. 357, 364 (1971). See, *e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970).[39] And, for that matter, the legislative history demonstrates that the Congress did in fact base its classification upon its assessment of the relative equities of the various classes involved. See pp. 18-21, *supra*.

It is equally irrelevant whether the lines drawn by the Congress were the most reasonable or perfect that could have been drawn. "Even if the classification involved here is to some extent underinclusive and overinclusive, and hence the line drawn by Congress is imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required.'" *Vance* v. *Bradley*, *supra* at 108. This Court has "repeatedly stated that there is no constitutional requirement that 'a statutory provision filter[] out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute.'" *Califano* v. *Boles*, *supra* at 4877. The existence of other alternatives is "irrelevant to the equal protection analysis," *Vance* v. *Bradley*, *supra* at 103 n. 20, even if such an alternative could be said to be "constitutionally preferable." *Holt Civic Club* v. *Tuscaloosa*, 439 U.S. 60, 73 (1978).[40]

And, it is irrelevant whether the "line drawn by Congress is longer than necessary to protect the fiscal in-

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[39] Hence, the District Court erred in holding that "the rationality of a statutory classification is tested against the actual purpose of the statute and not against a purpose created . . . after-the-fact." See p. 25, *supra*.

[40] Hence, the District Court's reliance on its conclusion that other means of resolving the financial difficulties of the railroad retirement fund were available and preferable (see p. 25, *supra*) was improper.

tegrity of the program," and that "unnecessary hardship is incurred by persons just short of qualifying." *Matthews* v. *Diaz*, *supra* at 83. "[A]ny line must produce some harsh and apparently arbitrary consequences," and the "task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line; the difference between the eligible and the ineligible are differences in degree rather than differences in the character of their respective claims. When this kind of policy choice must be made, [the Court is] especially reluctant to question the exercise of congressional judgment." *Id.*, at 83-84.[41]

In the *Diaz* case, the Court upheld the constitutionality of a statute in which the Congress, in order to protect the financial integrity of the medicare program, disqualified from eligibility for medicare benefits all aliens who had not both been admitted for permanent residence in the United States and a continuous resident of the United States for five or more years. That was not irrational since "those who qualify under the test Congress has chosen may reasonably be assumed to have a greater affinity with the United States than those who do not," so that "[i]n short, citizens and those who are most like citizens qualify," while "[t]hose who are less like citizens do not." *Id.*, at 83. In this case, those who qualify for a preserved windfall benefit "may reasonably be assumed to have a greater affinity with the [railroad industry] than those who do not," so that, in short, career railroad employees and "those who are most like" career railroad employees qualify, while those "who are less like" career railroad employees do not. That dis-

[41] Hence, the District Court erred in giving weight to its conclusion that members of the "Plaintiff Class" reasonably relied upon receiving a windfall benefit (see p. 25, *supra*), and its findings concerning the injury to the "Plaintiff Class" (J.S. App. 24a-26a) are irrelevant.

tinction, like the distinction made in *Diaz*, obviously is not irrational in the context of a statute primarily intended to provide "benefits for persons who pursue careers in the railroad industry."

4. We have noted in connection with the above discussion a number of errors in the lower court's equal protection analysis. See ns. 37, 39-41, pp. 33, 36-37, *supra*, and accompanying text. It is perhaps worthwhile to mention separately, however, what we regard as the most fundamental error made by the District Court in that regard. That is its conclusions to the effect that a purpose of the Congress in the 1974 Act was "to protect completely" the rights of all persons who had qualified under both the railroad retirement and social security systems as of December 31, 1974, and that the "Congress was unaware" that the Act "adversely affected the Plaintiff Class." See p. 25, *supra*.

We have shown that those conclusions, and the related findings concerning a purported misleading of the Congress by members of the Joint Committee, are contrary to fact.[42] The legislative history, as well as the language, of the 1974 Act make entirely clear that the Congress knew exactly what it was doing in regard to windfall dual benefits including the fact that such a benefit would not be preserved for the group that included the "Plaintiff Class" except insofar as they had qualified under both systems by the end of the year in which they left

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[42] We have also shown that the purported breach by the union representatives on the Joint Committee of their duty of fair representation is without basis in fact or law. See pp. 29-31, *supra*. But even if such a breach had occurred or the Joint Committee had sought to mislead the Congress, that would be irrelevant. This Court established long ago, in an opinion by Chief Justice Marshall, that "a legislative act, which the legislature might constitutionally pass" will not be invalidated "in consequence of the impure motives," including even corruption, of either those who sought the legislation or of "members of the legislature which passed the law." *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 130 (1810).

railroad service. See pp. 26-29, *supra*. We note, however, that since there is a rational basis for the distinctions made by the statute, it would not make any difference if the Congress had been unaware of its effect upon the "Plaintiff Class." *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73, 87-89 (1977).

CONCLUSION

For the reasons stated above and in the Jurisdictional Statement, we urge the Court to note jurisdiction of the appeal and summarily reverse the decision below. If that decision is not summarily reversed, the case should be set down for full briefing and argument.

Respectfully submitted,

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